

**NO. 48299-1-II**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

In Re the Dependency of S.K.P.

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**PIERCE COUNTY'S RESPONSE BRIEF**

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**A.     ISSUES PERTAINING TO APPELLANT'S  
ASSIGNMENTS OF ERROR**

1.     Should this Court accept as verities the trial court's unchallenged findings of fact?

2.     Has SKP failed to show that Washington State's due process clause provides greater protection of a dependent youth's right to counsel than the federal due process clause?

3.     Has SKP failed to show that Washington State's current statutory framework for reviewing a dependent youth's request for counsel on a case-by-case basis inadequately protects her due process rights?

4.     When evaluating a *dependent* youth's request for counsel, should the trial court apply the *Mathews*<sup>1</sup> factors to each child's individual circumstances to determine if due process requires the appointment of counsel?

**B.     STATEMENT OF THE CASE**

For purposes of this response, Respondent Pierce County incorporates by reference the facts as outlined by DSHS in DSHS' Response to Motion for Discretionary Review, filed with this Court on July 1, 2016.

Respondent Pierce County adds the following facts for the Court's consideration of this matter.

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<sup>1</sup> *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

On September 16, 2015, Pierce County intervened in the underlying dependency action for the limited purpose of responding to SKP's Motion for Appointment of Counsel at Public Expense. CP 148-152. Pierce County asked the court to deny appointment on the basis that RCW 13.34.100(7) and the *Mathews* factors did not warrant appointment of counsel under the circumstances of SKP's case.<sup>2</sup> CP 217-235. The court heard argument on SKP's motion for appointment of counsel on October 12, 2015. CP 327. The court declined SKP's invitation to address SKP's federal and state constitutional claims and instead analyzed SKP's request under RCW 13.34.100(7) and the *Mathews* factors. CP 327-30. The court determined that SKP's circumstances did not warrant appointment of counsel at public expense. CP 327-30. The court entered Findings of Fact and Conclusions of Law regarding the same on October 26, 2015. CP 339-342. These findings and conclusions are unchallenged on appeal and provide as follows:

#### I. FINDINGS OF FACT

1. The above-named child, [SKP], is a dependent child in Pierce County, Washington, who is placed in the care of her mother, [TC].

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<sup>2</sup> Pierce County presented evidence on the third *Mathews* factor – government interests – that the cost to the County would increase and additional administrative resources would be expended if an attorney was appointed for SKP, and most certainly if the court appointed attorneys in all dependency cases. See CP 233-235.

2. [SKP] has concerns and reluctance about visiting with her father. These concerns have been brought to the court's attention by the parties to the case, including the social worker and guardian ad litem, Robert Lee.
3. Dependency has never been established as to [JKP], the father of [SKP]. As such, there is no finding that he is unfit to parent [SKP].
4. This case has been referred to a court facilitator to assist the parents in completing a parenting plan for [SKP], with continued residence with her mother. Upon entry of a parenting plan it is anticipated this dependency will dismiss. That could happen within the next couple of months.
5. The government's interest in the issue of whether to appoint an attorney for the child is primarily a financial interest, in that the government will pay for the attorney and bear the costs of administration.
6. [SKP's] interests are aligned with the interest of her mother, with whom [SKP] resides. Her mother can and should advocate for [SKP's] interests.
7. The court can reconsider at any point in the future the need to appoint an attorney for [SKP].
8. At this time, [SKP's] interests are adequately safeguarded by her mother and the guardian ad litem. [SKP's] interest in having an attorney today is to present her concerns regarding visits with her father. The court has heard these concerns.
9. [SKP] has a counsel to work with her regarding visitation issues.
10. Prior to the filing of [SKP's] Motion to Appoint Counsel, [JKP], [TC], DSHS and the Guardian ad Litem were all in agreement with continuing visitation between [SKP] and [JKP].

## II. CONCLUSIONS OF LAW

1. In determining whether to appoint an attorney for [SKP], the Court does not need to reach a Constitutional issue.
2. This decision to appoint [SKP] is one that is properly analyzed using the test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), balancing "[t]he private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."
3. The decision to appoint an attorney for [SKP] is one that should be considered on a case-by-case basis, consistent with RCW 13.34.100.
4. Balancing the *Mathews* factors, [SKP's] interests are in line with her mother's interests, and therefore the risk of error is minimal.
5. This case does not present the extreme circumstances that would necessitate appointment of counsel for the child.

CP 339-342.

SKP moved for discretionary review of the trial court's order denying her request for counsel, and this Court granted the motion. After review was granted, however, the juvenile court dismissed SKP's underlying dependency. As a result, this Court noted this appeal for a court-initiated motion to dismiss and requested briefing from the parties on the issue of mootness. After considering the parties' legal memoranda, this Court declined to dismiss the appeal, finding that "two remaining issues



within the grant of discretionary review are largely legal issues unrelated to the particular circumstances of SKP's dependency." *Ruling Denying Court-Initiated Mot. to Dismiss at 3.*

The first issue is whether our state constitution mandates appointment of counsel for children in dependency actions.

...

The second remaining issue is, assuming a juvenile does not have a categorical right to counsel, whether the *Mathews* test that *M.S.R.*[<sup>3</sup>] applied to juvenile counsel requests in *terminations* is the test that juvenile courts should use when evaluating a *dependent* juvenile's request for counsel.

*Ruling Denying Court-Initiated Mot. to Dismiss at 3.* Based on this Court's ruling, it appears then that the trial court's application of RCW 13.34.100(7) to the particular facts of SKP's case no longer remains an issue in this appeal. As such, the only issues addressed in this response brief are (1) whether our state constitution mandates appointment of counsel for children in dependency actions, and (2) assuming a juvenile does not have a categorical right to counsel, whether the *Mathews* test should be used when evaluating a dependent youth's request for counsel.

Based on the narrow issues before this Court and pursuant to RAP 10.1(g)(2), Pierce County incorporates and adopts by reference the legal arguments of DSHS, as set forth in DSHS' Response to Motion for

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<sup>3</sup> *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012).

Discretionary Review, filed with this Court on February 1, 2015.<sup>4</sup> Pierce County adds the following legal arguments to assist the Court in its consideration of this matter.

**C.     ARGUMENT**

**1.     SKP's FAILURE TO ASSIGN ERROR TO FINDINGS OF FACT MAKES THEM VERITIES ON APPEAL**

RAP 10.3(g) requires a party to assign error to each finding of fact the party contends was improperly made, with reference to the finding by number. *See* RAP 10.3(g). The rule is silent on the question of whether specific assignments of error must be included for each conclusion of law entered by the trial court, or whether it is sufficient to address the trial court's conclusion of law in the body of the brief itself. The absence of such a requirement in RAP 10.3 implies that specific assignments of error are not required, but at least one post-RAP case has held to the contrary. *See King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-17, 846 P.2d 550 (Div. 1 1993) (court refused to consider conclusions of law to which

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<sup>4</sup> Pierce County intervened in the proceedings below for the purpose of providing evidence relevant to the court's consideration of the *Mathews v. Eldridge* factors: specifically the third factor – governmental interest. *See* CP 217-235. Based on this Court's ruling regarding mootness, the trial court's application of the *Mathews* factors to SKP's particular case no longer appears to be an issue in this appeal. Pierce County believes that DSHS has adequately and persuasively briefed the remaining issues in their Response to Motion for Discretionary Review.

no error had been assigned, even though legal issues had been addressed in appellant's brief).

Here, the trial court entered Findings of Fact and Conclusions of Law specific to the court's order denying appointment of counsel for SKP. *See* CP 339-342. SKP has not assigned error to any of the trial court's findings of fact or conclusions of law. As such, the findings of fact are verities on appeal, and this Court should consider whether SKP's failure to assign error to the conclusions precludes review entirely. *Johnson v. Cty. of Kittitas*, 103 Wn. App. 212, 216, 11 P.3d 862, 863-64 (2000), *as amended on reconsideration* (Jan. 11, 2001); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

**2. SKP FAILS TO SHOW THAT WASHINGTON STATE'S DUE PROCESS CLAUSE PROVIDES GREATER PROTECTION OF A DEPENDENT YOUTH'S RIGHT TO COUNSEL THAN THE FEDERAL DUE PROCESS CLAUSE**

SKP begins her argument with a sweeping claim that *all* dependent youth are entitled to counsel at public expense under article 1, section 3 of the Washington Constitution.<sup>5</sup> *See* Br. of App. at 14-30. As articulated by DSHS in their Response to Motion for Discretionary Review, SKP fails to show that the state constitution provides greater protection of a dependent

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<sup>5</sup> SKP provides this Court with a *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), analysis, after first claiming unpersuasively that a *Gunwall* analysis is not required. *See* Br. of App. at 14-30.

youth's right to counsel than the federal due process clause. *See* DSHS' Resp. to Mot. for Disc. Rev. at 5-20. Pursuant to RAP 10.1(g)(2), Respondent Pierce County hereby adopts and incorporates by reference all legal arguments on this issue as set forth in DSHS' Response to Motion for Discretionary Review. *See* DSHS' Resp. to Mot. for Disc. Rev. at 5-20.

**3. SKP FAILS TO SATISFY HER BURDEN OF SHOWING THAT THE STATE'S EXISTING STATUTORY FRAMEWORK FOR REVIEWING A DEPENDENT YOUTH'S REQUEST FOR COUNSEL INADEQUATELY PROTECTS HER DUE PROCESS RIGHTS**

By asserting that the due process clauses of the U.S. and Washington State constitutions require that *all* dependent children be appointed counsel in their dependency proceedings, SKP essentially argues that Washington's existing statutory system is unconstitutional because it does not guarantee counsel in every dependency proceeding. Accordingly, the question raised by SKP's constitutional arguments is properly framed as whether RCW 13.34.100(7) "is constitutionally adequate to protect ... children's liberty interests [in dependency proceedings]." *M.S.R.*, 174 Wn.2d at 21.

Whether a statute is constitutional is a question of law reviewed de novo. *M.S.R.*, 174 Wn.2d at 13. Where challenged, courts "presume that statutes are constitutional, and the challenger bears the burden of showing otherwise." *Id.* (citing *State v. Lanciloti*, 165 Wn.2d 661, 667, 201 P.3d 323 (2009)); *Ludvigsen v. City of Seattle*, 162 Wn.2d 660, 668, 174 P.3d 43

(2007); *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709 (2001)). The party challenging the statute must prove its unconstitutionality beyond a reasonable doubt. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn. 2d 201, 220, 5 P.3d 691, 701 (2000); *E.g., Island County v. State*, 135 Wn.2d 141, 146–47, 955 P.2d 377 (1998) (citing cases). This "demanding standard of review" is justified because, as a co-equal branch of government that is sworn to uphold the constitution, the judiciary assumes the Legislature considered the constitutionality of its enactments and, as such, affords great deference to its judgment. *See Island County*, 135 Wn.2d at 147. "Additionally, the Legislature speaks for the people and [the judiciary should be] hesitant to strike a duly enacted statute unless fully convinced ... that the statute violates the constitution." *Id.* (citing cases).

Here, while SKP doesn't articulate it as such, she is essentially making a facial challenge to RCW 13.34.100(7). The Court's focus when addressing constitutional facial challenges is on whether the statute's language violates the constitution, not whether the statute would be unconstitutional "as applied" to the facts of a particular case. *See JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 3–4, 891 P.2d 720 (1995). "[A] facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied." *In re Detention of Turay*, 139 Wn.2d 379, 417 n. 27, 986 P.2d 790 (1999) (quoting with approval *Ada*

*v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992) (Scalia, J. dissenting)). The practical effect of holding a statute unconstitutional on its face is to render it "utterly inoperative." *Turay*, 139 Wn.2d at 417 n. 27. Thus, in order to effectuate a facial challenge analysis, SKP would need to convince this Court beyond a reasonable doubt that there is no set of circumstances in which RCW 13.34.100(7) could satisfy due process. As articulated by DSHS in their Response to Motion for Discretionary Review – and incorporated by reference here – SKP has not made the requisite showing. *See* DSHS' Resp. to Mot. for Disc. Rev. at 21-32; RAP 10.1(g)(2). Accordingly, the Court should uphold the constitutionality of RCW 13.34.100(7).

**4. THE *MATHEWS* v. *ELDRIDGE* FACTORS SHOULD BE CONSIDERED WHEN EVALUATING A *DEPENDENT JUVENILE'S* REQUEST FOR COUNSEL**

In Washington, "[b]oth ... statutory law and our court rules give trial judges the discretion to decide whether to appoint counsel to children who are the subjects of dependency or termination proceedings." *M.S.R.*, 174 Wn.2d at 11-12; *See also* RCW 13.34.100(7)<sup>6</sup>; JuCR 9.2(c)(1). Although RCW 13.34.100 does not specify criteria for determining whether to appoint counsel, our Supreme Court has held that the decision to appoint counsel

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<sup>6</sup> As stated in RCW 13.34.100(7)(a), "[t]he court may appoint an attorney to represent the child's position in any dependency action on its own initiative, or upon the request of a parent, the child, a guardian ad litem, a caregiver, or the department." (Emphasis added.)

for a child in a *termination* of parental rights proceeding should be examined on a case-by-case basis by using the factors set forth in *Mathews v. Eldridge*.<sup>7</sup> *M.S.R.*, 174 Wn.2d at 22. As this Court noted in its Ruling Denying Court-Initiated Motion to Dismiss, no Washington court has decided whether the *Mathews* test that *M.S.R.* applied to juvenile counsel requests in *terminations* is the test that juvenile courts should use when evaluating a *dependent* juvenile's request for counsel.

Notably, SKP has not presented this Court with an alternative analysis for use in the dependency context. In fact, as noted by DSHS, this case illustrates perfectly why application of the *Mathews* factors on a *case-by-case* basis is the most appropriate analysis. *See* DSHS' Response to Mot. for Disc. Rev. at 24-25. As further articulated by DSHS, there are sufficient procedural safeguards in place to protect a juveniles' liberty interest should this Court determine that the *Mathews* analysis is the appropriate analysis. *See* DSHS' Response to Mot. for Disc. Rev. at 29-32.

Where SKP has not suggested an alternative test, this Court should hold that the case-by-case analysis for appointment of counsel provided by

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<sup>7</sup> In deciding whether to appoint counsel, *Mathews* requires weighing three factors: (1) the private interest at stake; (2) the risk of erroneous deprivation by the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *M.S.R.*, 174 Wn.2d at 14 (quoting *Lassiter v. Dept. of Social Svcs.*, 452 US 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)) (citing *Mathews*, 424 U.S. at 335).

RCW 13.34.100(6)(f) and *Mathews v. Eldridge* is the test that should be used when evaluating a *dependent* youth's request for counsel.

**D. CONCLUSION**

The statutory framework instituted by our Legislature in RCW 13.34.100(7) adequately protects the due process rights of SKP, and dependent children in general, by granting discretion to trial judges to decide on a case-by-case basis whether appointed counsel is necessary. *See M.S.R.*, 174 Wn.2d at 22. SKP has not sustained the heavy burden of showing that RCW 13.34.100(7) is unconstitutional or that the Washington due process clause provides more protection of a juvenile dependent's right to counsel than the federal due process clause.

Further, under the current statutory framework, trial courts should apply the three-factor balancing test outlined in *Mathews* to the unique circumstances of each dependency case in order to determine if due process is satisfied in any given case.

DATED this 15th day of July, 2016.

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## **CERTIFICATE OF SERVICE**

On July 15, 2016, I hereby certify that I electronically filed the foregoing PIERCE COUNTY'S RESPONSE BRIEF with the Clerk of the Court and I delivered a true and accurate copy via electronic mail to the following:

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**July 15, 2016 - 8:43 AM**

## Transmittal Letter

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